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In The

Supreme Court of the United States

No. 75-7534

GEORGE M. BOYD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, George M. Boyd, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on May 14, 1975.

OPINIONS BELOW

The opinion of the Court of Claims, not yet reported, appears in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Claims was entered on May 14, 1975. This Court's jurisdiction is invoked under 28 *U.S.C.* § 1255.

QUESTION PRESENTED

Whether the Assistant Secretary of the Air Force acted arbitrarily and capriciously in reversing the Correction Board's decision and thereby denied petitioner the due process of law guaranteed by the fifth amendment to the Constitution.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 10:

> § 1552. Correction of Military Records: Claims Incident Thereto.
>
> (a) The Secretary of the Military Department under procedures established by him and approved by the Secretary of Defense in acting through boards of civilians of the executive part of that military department may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

Air Force Manual 36-10(C2):

> ¶ 5-9 Letter of Evaluation.
>
> . . . Significant disagreements between comments made in the report and comments made in an attached letter of evaluation will be explained or justified in the comments of the indorsing official.

STATEMENT OF THE CASE

The petitioner is a retired major in the United States Air Force with over twenty years of distinguished service to his credit. On March 1, 1971, the petitioner was considered, but not selected, for promotion to the rank of lieutenant. Having been twice

passed over for promotion to that rank, the petitioner was mandatorily retired on November 1, 1971. The Selection Board which considered the petitioner's promotion had before it an Officer Effectiveness Report (OER) for the period of November 15, 1969, through November, 1970. (Court of Claims Opinion, p. 2). The record before the Board omitted reference to a Master's Degree in Public Administration conferred on the petitioner. (Brief for the Plaintiff, p. 12).

On July 31, 1971, the petitioner applied to the Air Force Board for the Correction of Military Records to have the OER voided. (Ct. Cl. Opinion, p. 2). The military presented no evidence before the Board. (Brief for the Plaintiff, p. 11). The findings of the Board revealed that the rating officer had not, in the last five years, visited the petitioner's station in order to evaluate his performance, despite repeated requests by the petitioner that he do so. (Plaintiff's Objections to Defendant's Motions to Dismiss, etc., p. 8). The Board found serious, unexplained discrepancies between the written and numerical evaluations of the rating officer. Discrepancies were also discovered between the evaluations of the petitioner's commanding officer, who characterized his performance as outstanding and who recommended him for immediate promotion, and that of the rating officer, whose rating of "excellent, seldom equalled" was not sufficient to support promotion. Consequently, the Board, acting unanimously, found the OER to be unjust and ordered it voided. Upon finding that similar instances had occurred twice previously which had required the Board to void unjust OER's; and that the military had not yet moved to correct those prior errors, the Board determined that the unjust treatment was likely to be repeated in the future, and therefore, ordered the petitioner's promo-

tion to the rank of lieutenant colonel. (Brief for Plaintiff, Exhibit #1).

The Assistant Secretary of the Air Force disregarded the Board's recommendation and refused the relief granted therein. This action was taken on the ground that, in his independent judgment, there was no actual discrepancy between the ratings, that the rating officer was better qualified than the petitioner's commanding officers to evaluate petitioner's performance, and that it would subvert the rating system to void an OER under these circumstances. (Brief for Plaintiff, Exhibit #2). The Court of Claims sustained the Assistant Secretary on the grounds that he was within his discretion and that his decision was supported by the evidence and was not arbitrary and capricious.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Affirms an Arbitrary and Capricious Administrative Decision Which Denies the Petitioner His Right to Due Process of Law and Which Establishes a Precedent for Future Abuses of Discretion Concerning the Correction of Military Records.

The due process clause of the fifth amendment protects individuals against arbitrary and capricious governmental action depriving them of life, liberty, or property. It has been recognized that basic due process guarantees apply to military personnel, *Betonie* v. *Sizemore*, 496 F.2d 1001 (5th Cir. 1974), particularly in the context of discharge proceedings such as are ultimately involved in this case. *Cole* v. *United States*, 171 Ct. Cl. 179 (1965).

> It is the function of the courts to make sure, in cases properly coming before them, that the men

> and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander.

Winters v. *United States*, 393 U.S. 896 (1968).

It was recognized in *Perry* v. *Sindermann*, 408 U.S. 593 (1973), that an individual may have a legitimate property interest in continued employment where the rules of the employing agency or mutually explicit understandings support entitlement to such employment. In the present case, the plaintiff is a career officer with over twenty years of service who was entitled to be either promoted, retained, or discharged in accordance with the proper procedures established by the Air Force and who has a cognizable interest under the due process clause. This interest is protected against arbitrary and capricious governmental action.

A. The Assistant Secretary's Decision Reversing the Corrections Board Was Arbitrary and Capricious, Unsupported by the Record, and in Conflict With the Letter and Spirit of the Air Force Rating System and Its Procedural Requirements.

The Correction Board, reviewing all the evidence before it, found serious discrepancies between the rating officer's "word picture," *i.e.*, written evaluation, and his numerical rating, and between the rating officer's evaluation and the letters of evaluation submitted by the petitioner's commanding officers, who had first-hand knowledge of petitioner's performance of his duties. (Brief for Plaintiff, Exhibit #1).

The Base Commanders, who were in daily contact with the petitioner, rated him "extremely outstanding" and recommended him for "immediate promotions"

and "promotion at the earliest date." (Defendant's Motions to Dismiss and for Summary Judgment, Exhibit 5). Under the Air Force System of numerical ratings for "overall evaluations," a "word picture" of "outstanding" equates to an 8 numerical rating. On the numerical scale for "promotion potential," the word picture "Demonstrates capability for increased responsibility; consider for promotion in advance of contemporaries," equates with a numerical rating of 3. (Defendant's Motion to Dismiss, Exhibit 7, pp. 36-48). The commander's comments, "promote at earliest date," and "recommend him for immediate promotion," clearly indicate that the Base Commanders recommended promotion not at the usual rate of petitioner's contemporaries, but ahead of them, and indeed, forthwith. The Rating Officer, however, rated the petitioner as "Excellent, seldom equalled" (numerical rating 7), and "Performing well in present grade; should be considered for promotion along with contemporaries," (numerical rating 2), which does *not support promotion*. (Brief for Plaintiff, p. 3).

The Correction Board found this to be a serious discrepancy. Such a disagreement would require explanation by the indorsing official under AFM 36-10(C2) ¶ 5-9. Lack of such explanation provided grounds to void the OER as unjust and as non-compliant with the Air Force's own regulations. The Assistant Secretary, however, refused to recognize any distinction between the two ratings, nor did he require any explanation for the disparity. (Brief for Plaintiff, Exhibit #2, pp. 1-2). Such an action must result from either unfamiliarity with the rating system or a willful refusal to recognize a hierarchy of numerical and descriptive distinctions which has been established by statute for

use in evaluating the performance of military personnel. The Assistant Secretary's conclusion is arbitrary and capricious in light of this well-established system.

Furthermore, his misinterpretation of the rating categories results in a violation of the Air Force's own regulation requiring explanations of rating disparities such as the one involved in the present case. Numerous cases have recognized that the Armed Forces must be bound by their own regulations. *Silverthorne* v. *Laird*, 460 F.2d 1175 (5th Cir. 1972); *Nixon* v. *Secretary of the Navy*, 422 F.2d 934 (2d Cir. 1970). The failure of the Air Force to abide by its own procedural requirements results in unfairness and a denial of due process to the petitioner.

As an alternative reason for his decision, the Assistant Secretary stated that, even if there might be some shade of difference between the two ratings, the Rating Officer was obviously better qualified to evaluate the petitioner than were the Base Commanders, since the Rating Officer compared petitioner's performance with that of other officers in his field. (Brief for Plaintiff, Exhibit #2, p. 3). This reasoning is somewhat disingenuous. In this case, the Rating Officer never observed the petitioner's performance. AFM 36-10(C2) ¶ 5-9 evidences a well-founded concern that in situations where the rating officer does not personally observe the ratee, there is a large margin for incorrect and biased evaluations. For this reason, an explanation is required where any discrepancy is evident between the evaluations of the Base Commander, who is in close contact with the ratee and has every opportunity to observe his conduct, and the distant rating officer who, in this case, was stationed more than 1,600 miles from the petitioner's base. (Brief for Plaintiff, p.

3). The Assistant Secretary has himself recognized the fallibility of such rating officers by voiding the ratings of the petitioner on two prior occasions. (Brief for Plaintiff, p. 4).

Moreover, there is no evidence that, in this case, petitioner's record was compared with that of other officers in similar positions. There was no evidence to that effect before the Board; in fact, the military presented no evidence of any kind. (Brief for Plaintiff, p. 11). Consequently, the Assistant Secretary not only acted in derogation of the policy behind AFM 36-10(C2) ¶ 5-9, but acted on an assumption of evidence not in the record. Such action is arbitrary and capricious. *Hertzog* v. *United States*, 167 Ct. Cl. 377 (1964).

The Assistant Secretary's final rationale was that voiding an OER under these circumstances would subvert the rating system. (Brief for Plaintiff, Exhibit #2, p. 2). As the previous discussion indicates, the result would be quite the contrary. The rating system is intended to operate fairly and evenhandedly with respect to all military personnel. The explanation requirement in ¶ 5-9 is designed to insure that personnel who have no contact with their rating officials are evaluated fairly and according to their actual capabilities. Voidance of the OER would uphold, not derogate, the policy behind that provision. In any event, it is doubtful whether such a generalized policy rationale should justify the infliction of injustice on an individual officer.

Finally, the Assistant Secretary chose to ignore the fact that the petitioner's record as it was presented before the Selection Board was not only defective in terms of the disparity of ratings but also in the omission of the petitioner's achievement of a Master's De-

gree. (Brief for Plaintiff, p. 12). The Assistant Secretary assumed that this omission would not affect the decision of the Selection Board. This assumption flies in the face of the "whole man" concept which requires that servicemen be evaluated on the basis of their total achievements and characteristics. While the Selection Board has wide discretion, it must have before it records which are substantially complete and fairly portray the officer's record. Where the record omits pertinent facts, it will not support the Selection Board's decision. *Weiss* v. *United States*, 187 Ct. Cl. 1, 408 F.2d 416 (1969). Thus, at the very least, the Assistant Secretary had the obligation to void the Selection Board's decision. His failure to do so was arbitrary and capricious.

When taken together with the additional fact that the military had obstinately failed to execute the corrections mandated by the Assistant Secretary's two prior decisions (Brief for Plaintiff, p. 12), the record clearly substantiated the Correction Board's conclusion that an order for promotion was appropriate in order to prevent recurrences of a pattern of discrimination against the petitioner. For the Assistant Secretary to override this conclusion without any support in the record was arbitrary and capricious. *Proper* v. *United States*, 139 Ct. Cl. 511 (1957).

The Assistant Secretary's action was arbitrary and capricious in that it lacked any basis in the record and clearly contravened both the spirit and the letter of the regulations establishing the Air Force ratings system. It also conflicted with two broader policy considerations, as discussed below.

B. The Assistant Secretary's Decision Contravenes the Traditional Policy of Civilian Control Over the Military As Expressed in 10 Rule U.S.C. § 1552(a), a Provision Which Requires Clarification by the Court, and Conflicts With the Principle of Deference to the Trier of Fact.

The constitutional tradition of this country reflects a deep-seated belief in the desirability of civilian control of the military. *Vallecillo* v. *David*, 360 F. Supp. 896 (D.N.J. 1973). This belief was embodied in 10 *U.S.C.* § 1552(a), which requires that the Secretaries of the various services, and their agents, must act "through civilian boards" in correcting military records. The function of the civilian Corrections Board is clearly to act as a check on the military hierarchy and assure fair treatment to military personnel. It has been recognized in numerous cases that the Secretaries and Assistant Secretaries of the services are often particularly susceptible to the influence of their military advisors. Where such officials act on military advice in reversing a Correction Board determination, they are invariably taken to task by the courts. *Hertzog, supra; Proper, supra; Weiss, supra.*

It is not clear under § 1552 exactly how much deference the officials should give to Correction Board determinations. (See the concurring opinion of Judge Nichols in the lower court decision, pp. 10-12). This question should be clarified in order to prevent a recurrence of just such abuses as the one involved in the present case. In any event, it has been held that a Secretary of a military department cannot overrule a recommendation of a Correction Board where the findings of the Board are justified by the record. *Turner* v. *Callaway*, 371 F. Supp. 188 (D.D.C. 1974). The courts have also refused to overturn

Correction Board decisions which are based on substantial evidence, *Hertzog, supra; Dorl* v. *United States,* 200 Ct. Cl. 626 (1973). In the present case, the Assistant Secretary's decision conflicts with the apparent intent of Congress to inject some civilian control into the process of correction of military records. It also is unsupported by the record. Moreover, the decision establishes a questionable precedent by allowing a Secretary to override the decisions of Corrections Boards essentially at his leisure by simply distorting the interpretation of the rating system.

Finally, the Assistant Secretary's capricious refusal to give any credence to the findings of the Board contravenes the established policy of deference to the trier-of-fact. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951). In the present case, the Corrections Board heard all the evidence which was presented. The Assistant Secretary was not present and did not at any time take in additional evidence. (Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment, p. 2). The Corrections Board found not only discrepancies in the various evaluations, but also a pattern of recalcitrance and bias against the petitioner, possibly resulting from racial considerations, which required immediate and affirmative action. The Assistant Secretary, acting on the basis of evidence not present on the record and in total disregard of the evidence that actually did exist, essentially presumed good faith on the part of the military and reversed the Board. Such action lacks any sense of deference to the trier of fact and, as noted above, conflicts with prior decisions establishing that the determinations of corrections boards are final if supported by the evidence. *Dorl, supra.*

CONCLUSION

The decision below affirmed an arbitrary and capricious decision by the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) which overruled a Correction Board decision, which unlike the Assistant Secretary's decision, was substantiated by the facts of the case. The decision resulted in a denial of due process of law to the petitioner and established a precedent by which the Assistant Secretary can override the Board's decisions by means of misinterpretation of the ratings system as applied. Such a precedent conflicts with the Air Force's own procedural requirements and with the policies of deference to the trier of fact and of civilian control over the military. In addition, the case calls into question the precise meaning of the language of 10 *U.S.C.* § 1152(a).

For these reasons, a writ of certiorari should be issued to review the judgment and decision of the Court of Claims.

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APPENDIX

In the United States Court of Claims

No. 53-74

(Decided May 14, 1975)

GEORGE M. BOYD v. THE UNITED STATES

G. Edmond Hayes, attorney of record, for plaintiff.
Lawrence S. Smith, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before NICHOLS, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court:

The question presented in this case is whether the Assistant Secretary of the Air Force for Manpower and Reserve Affairs acted arbitrarily and capriciously, and thus unlawfully, in rejecting certain recommendations of the Air Force Board for Correction of Military Records (hereinafter, the Correction Board) which were favorable to plaintiff and would have resulted in his promotion. We hold that the Assistant Secretary did not act arbitrarily, capriciously, or contrary to law. Therefore, his action cannot be set aside by the court. Plaintiff's petition must be dismissed.[1]

[1] Plaintiff's petition named the Secretary of Defense and the Secretary of the Air Force as defendants, in addition to the United States. As plaintiff conceded in oral argument, those named individuals are not proper defendants in this action. Plaintiff's petition is therefore dismissed as to those individuals at the outset. This court can enter judgments only against the United States. 28 U.S.C. § 1491; *National Cored Forgings Co. v. United States*, 126 Ct. Cl. 250, 256, 115 F. Supp. 469, 473 (1953).

Plaintiff is a retired Regular major in the United States Air Force with long and honorable active duty, beginning as a Reserve officer in 1948. Having been twice deferred for promotion to permanent lieutenant colonel, he was mandatorily retired on November 1, 1971, pursuant to 10 U.S.C. § 8913. The second selection board which, on March 1, 1971, considered, but did not select plaintiff for promotion, had before it as part of plaintiff's official record, his latest Officer Effectiveness Report (OER) covering the period November 15, 1969 through November 14, 1970. Upon notification that he was to be mandatorily retired, plaintiff unsuccessfully sought, under the provision of AFR 31-11, to have the foregoing OER voided by the Officer Personnel Records Review Board. Then, on July 31, 1971, he applied to the Correction Board for the following relief: (1) voidance of his most recent OER; (2) promotion to permanent lieutenant colonel effective July 9, 1971; (3) further promotion to the temporary grade of colonel; and (4) revocation of his mandatory retirement and restoration to active duty. The board held a hearing at which plaintiff made a personal appearance and was represented by counsel. For reasons discussed below, the Correction Board, in a decision on December 17, 1971, resolved in plaintiff's favor "reasonable doubt" that plaintiff had been justly treated by the selection board of March 1, 1971. It recommended that plaintiff's OER be voided, that plaintiff be restored to active duty, and that he be promoted to the rank of permanent lieutenant colonel. Only plaintiff's requested further promotion to the temporary grade of colonel was rejected by the board.

The board's recommendations were reviewed by the Assistant Secretary of the Air Force for Manpower and Reserve Affairs.[2] The Assistant Secretary, on February 21, 1972, rejected the board's recommendations and denied plaintiff's application because he found no error or injustice in the record. Plaintiff challenges the Assistant Secretary's action by this suit filed February 13, 1974.

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[2] Pursuant to 10 U.S.C. § 1552, the Secretary was authorized, under procedures established by him, to act upon the recommendations of the Correction Board. The Secretary delegated this function to the Assistant Secretary by AF Order 100.1 of August 1, 1969, and by a later order dated April 17, 1972.

The alleged error or injustice in this case is the rating received by plaintiff in that final OER. The OER required the rater to assess the officer's "overall evaluation" and "promotion potential." In the former category there were nine choices, the highest three of which were in the following order of descent:

9 Absolutely superior.
8 Outstanding; almost never equaled.
7 Excellent; seldom equaled.

In the category of "promotion potential," there were four choices, the highest three of which were:

4 Outstanding growth potential based on demonstrated performance; promote well ahead of contemporaries.
3 Demonstrates capability for increased responsibility; consider for advancement ahead of contemporaries.
2 Performing well in present grade; should be considered for promotion along with contemporaries.

Plaintiff was rated a 7–2.

The questioned OER contained two attached "letters of evaluation." The letter by plaintiff's TAC wing commander at McConnell AFB, Kansas, noted that Major Boyd had performed in "an extremely outstanding manner" as commander of his manpower management engineering detachment, that his leadership was "outstanding," that he had engaged in various activities to improve himself, including completion of 24 hours of graduate education toward a master's degree to be completed in December 1970, and recommended plaintiff for "immediate promotion to the grade of Lieutenant Colonel."

The deputy base commander at McConnell AFB also spoke in glowing terms of plaintiff's efficiency, his professionalism, his advanced educational efforts scheduled to result in a master's degree in December 1970, initiatives beyond the boundaries of duty, and recommended that since he was "fully capable of assuming greater responsibilities compatible with the rank of lieutenant colonel [that he] should be promoted at the earliest date."

The director of Manpower and Organization at TAC headquarters, Langley AFB, Virginia, was the rating officer. His statement said that under plaintiff's leadership his detach-

ment had functioned in an "excellent manner." He recognized plaintiff's self-improvement efforts and his public relations activities reflecting favorably upon the Air Force. The deputy chief of Plans, Langley AFB, while stating that he had not personally observed plaintiff's duty performance, indicated he was aware of plaintiff's efforts at McConnell AFB and endorsed and concurred in the comments and evaluation of the rating officer.

Neither the rater nor the deputy chief of Plans at Langley AFB had directly supervised plaintiff during the period covered by the OER. Plaintiff was stationed at McConnell AFB in Kansas, while the rater and the deputy chief were at Langley AFB, Virginia. It appears that neither visited McConnell AFB during the period in question. Such a circumstance, however, is anticipated. AFM 36–10(C3), para. 5–9 (1968), provides that where the rater is unable directly to supervise the officer to be rated, he should obtain evaluation letters from the official most familiar with the performance of the officer who is rated. This was done in the instant case by the two evaluation letters from McConnell AFB made a part of the OER.

The heart of plaintiff's argument, and the basis for the Correction Board's favorable recommendations, is that the 7–2 rating received by plaintiff is allegedly inconsistent with the rater's own comments and with the letters of evaluation written by plaintiff's immediate supervisors at the McConnell AFB. The Assistant Secretary, in rejecting the board's recommendations, found no inconsistencies and further stated that any inconsistency between the OER and the evaluation letters would not in any event provide a basis for voiding the OER. Before considering the alleged inconsistencies, we should first recall the standard by which we review the Assistant Secretary's decision.

Pursuant to 10 U.S.C. § 1552, the Secretary, "under procedures established by him," and "acting through boards of civilians of the executive part of that military department," may correct a military record "when he considers it necessary to correct an error or remove an injustice." It is clear from the statute that the Secretary's decision is a discretionary one. The statute is implemented by AFR 31–3, para. 22 (1970), which states:

> 22. *Action by the Secretary of the Air Force.* The record of the Board's proceedings will be forwarded to the Secretary of the Air Force who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consideration when deemed necessary.

It is thus seen that whereas the Secretary in correcting a military record is to act through a board of civilians, as required by statute, he has by regulation authorized by the statute retained the authority to take such final action on board recommendations as he determines to be appropriate. The regulation is thus not in conflict with the statute. Moreover, another statute, 10 U.S.C. § 8012, gives to the Secretary of the Air Force complete responsibility for conducting all affairs of his department. That section gives to the Secretary authority to delegate his powers to assistant secretaries. Further, it states in subsection (e) as follows:

> (e) The Secretary, as he considers appropriate, may assign, detail, and prescribe the duties of the members of the Air Force and civilian personnel of the Department of the Air Force.

We consider this sufficient also to encompass the board of civilians constituting the Air Force Board for the Correction of Military Records. Air Force Order 100.1 assigned to the Assistant Secretary for Manpower and Reserve Affairs the authority to act with the authority of the Secretary in matters of manpower and organization, formulation, review and execution of plans, policies and programs relating thereto, and including the Air Force Board for Correction of Military Records. We adhere to the view expressed in *Proper* v. *United States*, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957), that when he acts to correct a military record (he did not correct one here) it should be through the board. Because of the board's broad authority, its recommendations are entitled to considerable respect. But, as we said in *Proper*, *supra*, 139 Ct. Cl. at 526, 154 F. Supp. at 326, "we do not suggest that the Secretary may not overrule the recommendations of the Correction Board where the findings of that Board are not justified by the record on which the findings were made." *Accord*, *Mercereau* v. *United States*, 155 Ct. Cl. 157 (1961).

The court, in turn, may reject the decision of a Secretary only if he has exercised his discretion arbitrarily, capriciously, in bad faith, contrary to substantial evidence, or where he has gone outside the board record, or fails to explain his actions, or violates applicable law or regulations. Then we will not hesitate to set him right. *Weiss* v. *United States*, 187 Ct. Cl. 1, 5, 408 F. 2d 416, 418 (1969); *Hertzog* v. *United States*, 167 Ct. Cl. 377, 383 (1964); *Eicks* v. *United States*, 145 Ct. Cl. 522, 527, 172 F. Supp. 445, 448 (1959); *Proper* v. *United States*, *supra*, 139 Ct. Cl. at 526, 154 F. Supp. at 326. A decision which is contrary to all evidence would clearly be arbitrary. *Betts* v. *United States*, 145 Ct. Cl. 530, 535, 172 F. Supp. 450, 453 (1959).

Short of such decisional errors, the Assistant Secretary's discretion is not to be interfered with lightly, especially in view of the courts' traditional reluctance to involve themselves in internal affairs of the military, in which they have little or no special competence and less responsibility. *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953); *Mindes* v. *Seaman*, 453 F. 2d 197 (1971). The Secretary and selection boards appointed pursuant to his authority, 10 U.S.C. § 8297, are presumed to perform fairly and lawfully in absence of clear and persuasive evidence to the contrary. *Cooper* v. *United States*, 203 Ct. Cl. 300 (1973); *Brenner* v. *United States*, 202 Ct. Cl. 678, 685-86, 692, 696 (1973), *cert. denied*, 419 U.S. 831 (1974). The Secretary found no such evidence to vitiate the selection board decision in the record before the Correction Board or in the rationale of that board's conclusions and recommendations.

The Assistant Secretary's finding that plaintiff's 7-2 rating was consistent with the rater's written comments or "word picture" is unassailable. The "overall evaluation" of a "7" means "excellent, seldom equaled"; the rater describes the functioning of the 4500th Support Squadron (TAC), under plaintiff's leadership, as "excellent." Thus, even the same adjective is used. With regard to "promotion potential" plaintiff was rated as a "2," meaning "performing well in present grade; should be considered for promotion along with contemporaries." No disparity is shown between the rater's laudatory comments and such a rating.

The alleged inconsistency between the OER and the letters of evaluation is a weightier argument, but we are not prepared to reverse the Assistant Secretary's decision that such inconsistency did not exist, or if it did exist, it would be a bad precedent and contrary to his policy that forbids letters of evaluation by local commanders from being binding on the rating officer and thus guaranteeing promotion regardless of all other factors the rating officer must consider on a broader basis. The evaluation letters referred to plaintiff as "outstanding," while the OER rated plaintiff as "excellent, seldom equaled." As the Assistant Secretary pointed out, the rating "excellent, seldom equaled" is further defined in AFM 36-10 (C2), para. 6.5 (1968), to mean an "officer whose exceptional performance is worthy of special notice. He must perform most aspects of his job in an outstanding manner." The next higher rating (an "8") is defined as follows:

> (8) *Outstanding, Almost Never Equaled.* Rating in this box must be reserved for those very few officers, whose performance, initiative, leadership, and personality set them apart *as having the potential for high staff or command assignments.* [Emphasis supplied.]

Plaintiff's endorsements did not suggest plaintiff had the potential for such command. It may be seen, therefore, that plaintiff's rating of "7" ("perform[s] most aspects of his job in an outstanding manner") cannot be found clearly inconsistent with his evaluation as "outstanding" by his base commanders. Nor can it be said that plaintiff was clearly entitled to higher rating or promotion just because he was recommended for it by his base commanders. As the Secretary said, that "would be to hold that the local commanders may usurp the assigned function of the rater, and that would be to pervert the OER system."

The Assistant Secretary acted within his discretion, as well, when he failed to find a discrepancy between the rater's recommendation that plaintiff be promoted along with his contemporaries and the evaluation letters which recommended promotion "at the earliest date" or "immediate promotion." As was pointed out by the Secretary, immediate promotion in the circumstances of this case would have been

promotion with contemporaries. Furthermore, the Assistant Secretary stressed that the rater is the only official with the responsibility and opportunity to compare plaintiff with other officers. For instance, if all majors were recommended for promotion, or more were recommended than authorized for appointment, the rater must attempt to ascertain which are best qualified. This comparison function of the rater applies equally, of course, to plaintiff's "overall evaluation" discussed above.[9] Under the Air Force Manual 36–10, para. 6–5 (1967), the rating officer is charged with making "each judgment * * * only in comparison with other officers serving in the same grade at the time the report is made." The Assistant Secretary's decision stated, in part:

> * * * And as the TAC Officer Evaluation Report Review Board noted, the rater was well qualified in the manpower field and was obviously better qualified to evaluate the applicant in his primary responsibility, manpower-management, than the local commanders; he was in a position to compare the effectiveness of the unit under the applicant's leadership with other manpower detachments throughout TAC and to know how the applicant responded to TAC requirements. * * * the rater had comparative performance information available to him which the local commanders did not * * * which could well account for any shadings of difference in the evaluations.

The Secretary, however, found no significant disagreements between the rater's evaluation and the letters of evaluation which required explanation or justification, and neither do we.

It follows that since the Assistant Secretary acted with reasonable discretion in upholding the validity of the OER, he was acting properly and within his statutory authority in

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[9] An inconsistency between the evaluation letters and the OER is suggested by plaintiff. The letters noted that plaintiff's application for a master's degree had been approved for December 1970 completion. The OER, on the other hand, stated only that plaintiff had completed 22 hours towards his master's degree. If there is any inconsistency here, it is *de minimis*. Plaintiff had not qualified for his degree during the period covered by the OER. Furthermore, plaintiff had the right to notify the selection board of the fact that he had attained the degree. 10 U.S.C. § 8297(e). The board met on March 1, 1971. The court record does not show when the degree was actually awarded, but the potential award was in the rater's knowledge, noted by him, and thus before the selection board.

rejecting the Correction Board's recommendations that plaintiff be promoted to lieutenant colonel and restored to active duty. Since there is no basis for voiding the OER, there is no basis for agreement with the Correction Board in overriding the selection board's action in not selecting plaintiff for promotion. It might be noted that even had the OER been voided, or had plaintiff been rated more highly, there was no assurance that plaintiff would have been promoted. The function of the Secretary and of a selection board as to appointments and promotions is discretionary and their actions cannot be presumed. *Cooper* v. *United States*, *supra*; *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970). At least five selection boards at one time or another had deferred plaintiff for promotion although at one time a board had before it the three highest ratings plaintiff had received in his military career—8–4, 8–3, and 8–3.

The fact that plaintiff has been passed over signifies no disrespect to him. His military record appears, from all the papers before us, to have been exemplary in every respect. Numerous worthy and qualified officers are passed over annually and never reach the top in their profession. They may be qualified but—in the judgment of the Secretary and the selection board vested with discretionary authority to make the promotions—may not be the best qualified of those available for the limited number of positions. The same problem can be said to confront other ambitious professional people. There are fewer rungs as one climbs toward the top of the achievement ladder. Not only are manpower requirements a factor but appropriations also sometimes have a bearing on availability of opportunities in the Government service. We have not been shown here that any officer with a record comparable to plaintiff's was promoted ahead of him. There is no showing of bias or prejudice here which might suggest an error or injustice in selection board proceedings. Indeed, we note in passing that the Secretary on two prior occasions—in 1968 and in 1970—did sustain the Correction Board recommendations to correct plaintiff's OER's. This tends to show that where justified by the evidence plaintiff has been granted relief administratively and that he has not been singled out by the Secretary for unfavorable treatment.

The Correction Board's conclusion in plaintiff's favor, based entirely on what it described as "reasonable doubt whether he did in fact receive a just and equitable consideration by the permanent lieutenant colonel selection board" does not withstand the contrary analysis and conclusion made in good faith, within the law, and without arbitrariness or caprice by the Assistant Secretary in the present case. To change a record upon such a tenuous basis would be without support in law, unjustified, and unfair to others who in all probability have been passed over with qualifications similar, or superior, to plaintiff's. In sum, we cannot find upon careful examination of the considerable record in this case, that the Assistant Secretary acted unlawfully in rejecting assertions of alleged inconsistencies in plaintiff's OER and lack of support for it in the letters of evaluation, and in refusing to reinstate or to promote plaintiff contrary to selection board determination. We cannot predicate a judgment here based on a mere nuance as to a rating, which is a debatable one at best. Ratings and promotions are discretionary matters with which the court will continue to be "scrupulous not to intervene" unless clear error is shown or relief is mandated by law or regulation. *Orloff* v. *Willoughby*, *supra* at 94; *Yee* v. *United States*, Ct. Cl. No. 449–73, decided March 19, 1975; *Dorl* v. *United States*, 200 Ct. Cl. 626, *cert. denied*, 414 U.S. 1032 (1973). There is no legal basis for any of plaintiff's claims.

Defendant's motions to dismiss and for summary judgment are granted. Plaintiff's cross-motion for summary judgment is denied. The petition is dismissed.

NICHOLS, *Judge*, concurring:

I concur in the result. Respectfully, I venture to differ with the court's reasoning on only one or two points, though agreeing with most of what it has to say.

The Act, 10 U.S.C. § 1552, for Correction of Military Records, was passed in 1946 in course of an ambitious effort in legislative reorganization, to delegate the function of considering what had been private bills passed upon, at least theoretically, by the entire Congress. The Indian Claims Commission Act, 25 U.S.C. § 70a and ff., also was born in

the same spasm; the two Acts are twins in other respects than that both make this court a lot of work. In view of their origin, both must be regarded as delegating legislative authority. Both call for recognition and enforcement of moral obligations, which is primarily a legislative function. *United States* v. *Realty Co.*, 163 U.S. 427 (1896). Normally the legislature transmutes moral obligations into legal, which judicial and quasi-judicial tribunals then enforce. Here the two functions are merged into one.

In 1946 the citizen soldiers and sailors drafted to fight World War II were pouring back into civil life. The feeling—right or wrong—was that many of them might be handicapped by bad military records created without due process in the hurly-burly of the war, and that the career military who would remain in charge at the Pentagon would not be much interested in effecting corrections. Hence the provision that the Service Secretaries should act "through boards of civilians". I have never had explained to me just what that language means. On the one hand, the legislative purpose would appear to be frustrated if the Board members are simply part of the Secretaries' staff advisers, to be overruled at pleasure. On the other, it has never been held that he must delegate full authority to the civilian Board, as he does with Wunderlich reviews of contract disputes. That Act, 41 U.S.C. § 321-22, offers more sweeping protection to the citizen against military absolutism in his capacity as contractor, than the Correction Board legislation affords him in his capacity as a uniformed military employee, possibly an involuntary one. But the latter Act must be construed to accomplish some purpose, in everything that it says. It could have said the Secretary could correct military records, taking advice from whatever source he pleased. When Congress said he was to do it through a civilian Board, this must have had a meaning. *Proper* v. *United States*, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957). *See*, *Ogden* v. *Zuckert*, 298 F. 2d 312, 316 (D.C. Cir. 1961).

In light of the foregoing the Air Force regulation, AFR 31-3, is notably silent as to whether the Air Force Secretary is required to attach any weight to Board decisions. This presents at least a potentiality of frustrating the Congressional intent, and explains the care with which we always,

as here, scrutinize a Secretary's decision overruling a Correction Board. A declaration of the guidelines the Secretary follows in performing his review function would ease our task considerably. It is true the Secretary also is a civilian, but he is so dependent on his military subordinates that this fact alone is often, as in the legislation here involved, not deemed enough to effectuate our constitutional supremacy of civilian over military authority. If we find the overruling of the Board was achieved by or through a military adviser, the action is set aside. *Weiss* v. *United States*, 187 Ct. Cl. 1, 408 F. 2d 416 (1969); *Proper* v. *United States*, *supra*. The court cites three other instances, before *Weiss*, when we reinstated a Board decision after a Secretary had overruled it. *Hertzog* v. *United States*, 167 Ct. Cl. 377 (1964); *Betts* v. *United States*, 145 Ct. Cl. 530, 172 F. Supp. 450 (1959); *Eicks* v. *United States*, 145 Ct. Cl. 522, 172 F. Supp. 445 (1959). In those cases, the Secretary's decision appeared arbitrary in face of the Board record and the facts that the records showed; therefore, even if the Board had recommended that the Secretary do what he did, reversal of the Secretary would very likely have been our decision. I do not read the decisions as affording any help as to what was added to the Secretary's duty to take a particular action by the fact the Board recommended he take it.

I am inclined to think the Secretary can and should reject a Board recommendation when he observes upon review that it is contrary to law, arbitrary and capricious, or not supported by substantial evidence. These are our review standards. *Cooper* v. *United States*, 203 Ct. Cl. 300 (1973). He must, however, recognize that the Board is, within reasonable limits, a policy-making body. It is for the Board, given a state of facts, to say if it is an error or injustice. Its discretion must be broad even if not unlimited. The Secretary may not reverse it merely because his nose for injustice is less sensitive than the Board's. In my view, however, a Board decision is contrary to law if it runs up against the declared policy of a law, *i.e.*, its charter does not include the power to go around overriding other laws *ad lib*. *See*, *Mayer* v. *United States*, 201 Ct. Cl. 105, 107 [Nichols J., concurring] (1973).

The use of Selection Boards to select regular officers for promotion (10 U.S.C. § 8297) and the retirement of those not selected (10 U.S.C. § 8303) are basic to the performance of the Air Force mission. It is a highly sensitive and discretionary function. We were told that the Selection Board plaintiff complains of had to pass over 20% of the names before it. These Boards and the way they operate are just as much products of the Congressional will as Correction Boards are. I do not believe either one is entitled to override the other. A Selection Board decision based on a misleading and injust record cannot stand, *Weiss*, *supra*, but if it is legally made within the Selection Board's powers, it is the duty of the Secretary to defend it against all interference. The Correction Board here would have promoted plaintiff though it had no information in its record to show his qualifications were superior to those of others who were passed over, and I judge that sooner or later, because of the limited number of slots, someone else would not have been promoted, if plaintiff was, which other person could, so far as the Correction Board knew, perfectly well have had superior qualifications to the plaintiff's.

Plaintiff had able and persuasive counsel who made the most of what appears to me to be a weak case, weak for reasons well analyzed by Judge Bennett. It is impossible to find any clearcut falsity or unjust derogation of plaintiff in the O.E.R. under attack, on careful study of it in chambers. The Secretary's analysis was essentially the same as ours. Having made it, he had to draw the conclusion that the Correction Board would interfere with the Selection Board in a matter within the the latter's exclusive jurisdiction. I do not view this as a discretionary decision: it was one it was his duty to make. Had he analyzed the facts as the Correction Board did, his duty would have been different, but such an analysis would have been hard to defend. The substantial evidence rule was not available to sustain the Board. The evidence in the record was undisputed and the result turned on the interpretation of documents. I am not, of course, saying that a promotion would be *ultra vires* for the Correction Board under all circumstances.

My difference with Judge Bennett is that I see the matter as more governed by law and less governed by executive discretion than he does.

Plaintiff clearly was an officer of great value to the Air Force and one may hope that, even now, some way may be discovered to make use of his services. The undermining of the Selection procedure is, to me, just simply not the way to go about it. It does more wrong than it rights.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-753

GEORGE M. BOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former major in the regular United States Air Force, contends that the Secretary of the Air Force acted arbitrarily and capriciously in declining to accept a recommendation of the Air Force Board for Correction of Military Records that petitioner be promoted to lieutenant colonel.

Petitioner was involuntarily retired from the Air Force pursuant to 10 U.S.C. 8913, because he had been twice considered and passed over for promotion to the permanent grade of lieutenant colonel. After he was passed over for promotion for the second time, petitioner applied for relief to the Air Force Board for Correction of Military Records. The Board recommended to the Secretary that petitioner be promoted to the temporary rank of lieutenant colonel and that his retirement be rescinded. On review, the Assistant Secretary of the Air Force for Manpower and Reserve Affairs, acting as the Secretary's

delegate (Pet. App. A2, n. 2), rejected the Board's recommendation "because he found no error or injustice in the record" (Pet. App. A2).

Petitioner then sought review of the Assistant Secretary's determination in the Court of Claims.[1] After a "careful examination of the considerable record" (Pet. App. A10), the court sustained the Assistant Secretary's determination as not arbitrary or capricious.

This case presents essentially factual questions concerning the correctness of the "overall evaluation" and "promotion potential" ratings used in considering petitioner for promotion. Petitioner's principal argument here (Pet. 4-9) is that those ratings did not fully reflect the favorable assessments of his superior officers.[2] These factual matters, involving the nuances of military judgment with respect to the rating and promotion of an individual officer, do not warrant review by this Court.

Moreover, the decision below is correct. The Court of Claims carefully considered petitioner's contentions and concluded that the Assistant Secretary's finding that the

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[1]In our view, the Court of Claims lacked jurisdiction because this case does not involve a claim to "actual, presently due money damages from the United States." *United States* v. *King*, 395 U.S. 1, 3. See our reply brief in *United States* v. *Testan and Zarrilli*, No. 74-753, argued November 12, 1975.

[2]Petitioner also argues (Pet. 10-11) that the Assistant Secretary failed to pay proper deference to the Board's decision. This, too, resolves into an essentially factual contention which was correctly rejected by both the majority (Pet. App. A5, A8-A9) and the concurring judge (Pet. App. A13) below on the ground that the Board's decision itself had not been supported by substantial evidence.

ratings were accurate had substantial support in the record (Pet. App. A3-A9).[3] The court concluded by observing (Pet. App. A9-A10):

> Numerous worthy and qualified officers are passed over annually and never reach the top of their profession. * * * We have not been shown here that any officer with a record comparable to [petitioner's] was promoted ahead of him. There is no showing of bias or prejudice here which might suggest an error or injustice in selection board proceedings. * * *
>
> The Correction Board's conclusion in [petitioner's] favor, based entirely on what it described as "reasonable doubt whether he did in fact receive a just and equitable consideration by the permanent lieutenant colonel selection board" does not withstand the contrary analysis and conclusion made in good faith, within the law, and without arbitrariness or caprice by the Assistant Secretary in the present case. To change a record upon such a tenuous basis would be without support in law, unjustified, and unfair to others who in all probability have been passed over with qualifications similar, or superior, to [petitioner's]. * * * Ratings and promotions are discretionary matters with which the court will continue to be "scrupulous not to intervene" unless clear error is shown or relief is mandated by law or regulation. *Orloff* v. *Willoughby*, [345 U.S. 83] at 94.

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[3]In its opinion, the court specifically answered petitioner's various claims of procedural irregularities such as his contentions (Pet. 8-9) that there is no evidence that his performance had been compared with that of other officers (see Pet. App. A8), and that his receipt of a master's degree had not been considered (Pet. App. A8, n. 3).

For the reasons stated above and in the opinion of the Court of Claims, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

DOJ-1976-02